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SERVICE DATE - MARCH 18, 2002

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE

STB Docket No. AB-290 (Sub-No. 220X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—  
IN WISE COUNTY, VA

Decided: March 14, 2002

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon a 3.03-mile line of railroad between milepost A-0.0, at Arno Jct., and milepost A-3.03, at Derby, in Wise County, VA (line). Notice of the exemption was served and published in the Federal Register on December 21, 2001 (66 FR 66017). The exemption became effective on January 22, 2002.<sup>1</sup>

By a late-filed petition, Wise County Board of Supervisors (Wise County)<sup>2</sup> requests the issuance of a notice of interim trail use (NITU) for the entire line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,<sup>3</sup> in order to negotiate with NSR for acquisition of the right-of-way for use as a

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<sup>1</sup> By decision served on January 18, 2002, the exemption was made subject to the following conditions: (1) to address the concerns raised by the Commonwealth of Virginia Department of Environmental Quality, NSR shall, prior to commencement of any salvage activities on this project, contact the Commonwealth of Virginia Department of Environmental Quality concerning possible impacts from fugitive dust emissions; and (2) prior to any salvage activities, NSR shall consult with the Commonwealth of Virginia Department of Game and Inland Fisheries (Amy Martin at 804-367-2211) to evaluate potential impacts to federal and state endangered mussel species that may occur in waterways that are crossed by or are adjacent to the rail line proposed for abandonment.

<sup>2</sup> Although Wise County's petition was dated January 28, 2002, it was not filed at the Board until March 11, 2002.

<sup>3</sup> The Board's Section of Environmental Analysis (SEA) served an environmental assessment on December 28, 2001, which indicated that the right-of-way may be suitable for other public use following abandonment.

recreational trail.<sup>4</sup> Wise County requests that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. Wise County states that it needs the full 180-day period because it has not had an opportunity to assemble or to review title information, complete a trail plan or commence negotiations with NSR. It submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By letter filed on March 7, 2002, NSR advised the Board that it was willing to negotiate with Wise County.

Because Wise County's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Wise County has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the exemption.

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<sup>4</sup> The December 21, 2001 notice of exemption provided that trail use/rail banking requests had to be filed by December 31, 2001, and that requests for public use conditions had to be filed by January 10, 2002. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that Wise County's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company—Abandonment Exemption—in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public condition will expire on July 21, 2002,<sup>5</sup> while the trail use negotiations period will run from 180 days from the service date of this decision (until September 14, 2002). If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining portion of the right-of-way intact for the remainder of the period for public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with Wise County, but may engage in negotiations with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The late-filed request for a NITU under 16 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.
3. The notice of exemption served and published in the Federal Register on December 21, 2001, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below.
4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision, NSR may discontinue service, and salvage track and related materials. NSR shall otherwise keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts and tunnels, for a period of 180 days from the effective date (until July 21, 2002), to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before July 21, 2002, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

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<sup>5</sup> Under 49 U.S.C. 10905, the Board may prohibit the disposal of rail properties that are proposed for abandonment and are suitable for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

5. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligation for the right-of-way.

7. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by September 14, 2002, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line.

9. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary